(2)

No. 89-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION,
Petitioner,

vs.

TODD GANDER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. In a diversity action for personal injuries based on product liability law of Missouri, does federal law mandate jury instructions on (a) the effect of taxes on future lost earnings and (b) the non-taxability of a jury's award of damages where applicable Missouri law precludes such instructions?

II. Is an appropriate case presented for review of Question I by certiorari where the defendant failed to tender such instructions at trial and made no complaint in the Court of Appeals regarding the absence of such instructions?

III. In such a diversity action, does federal law mandate cross-examination by defense counsel of plaintiff's economist regarding the income tax effects on lost future earnings where Missouri law precludes such cross-examination?

IV. Is an appropriate case presented for review of Question III by certiorari where the trial court *allowed* defense counsel to conduct such cross-examination, but also stated it would grant a mistrial if plaintiff could show that such cross-examination was improper, and defense counsel voluntarily chose to make no further efforts to cross-examine the economist about income taxes?

V. Where Missouri law permits no reduction of damages under a strict liability theory in connection with an assessment of a percentage of fault to plaintiff under a comparative negligence theory, and where the Court of Appeals expressly recognized that the jury was properly instructed on those issues, is a new trial mandated by [illegible] of a concluding "note" in a verdict form (not an instruc-

tion as petitioner represents to the Court) which the Court of Appeals held was legally correct but "potentially confusing"?

VI. Is an appropriate case presented for review of Question V by certiorari where the defendant made no specific objection to the concluding "note" under Rule 51, Fed.R.Civ.Pro., and tendered no alternative verdict form or language to clarify the meaning of that "note"?

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STATEMENT OF THE CASE

Defendant FMC Corporation (hereinafter "FMC") appealed a judgment in favor of Todd Gander for Two Million Dollars. This judgment was entered by the District Court on July 13, 1988, following a jury trial.

Jurisdiction in the District Court was based on diversity of citizenship. Missouri law of product liability was applicable.

Gander's theories of recovery for personal injuries were alternative theories of strict liability and negligence. Under Missouri law, comparative negligence applied only to a negligence theory and not to the strict liability theory. The jury found in favor of Gander on the strict liability theory. The jury also found in favor of Gander on the negligence theory and assessed ten percent fault to FMC and ninety percent fault to Gander. The jury assessed Gander's total damages at Two Million Dollars.

The District Court initially entered judgment for Two Hundred Thousand Dollars. However, on Gander's motion to amend judgment, the District Court held that Gander was entitled to Two Million Dollars on the strict liability claim which could not be reduced by Gander's comparative fault under Missouri law. The judgment of the District Court was affirmed by the United States Court of Appeals for the Eighth Circuit. *Gander v. FMC Corp.*, 892 F.2d 1373 (8th Cir. 1990).

On February 23, 1985, while working for Anheuser-Busch in St. Louis, Todd Gander lost his right arm at the elbow while working as a coal conveyor operator. At the time of trial, the average pay for coal conveyor operators was approximately $48,000.00 plus benefits.

The coal conveyor on which Gander was injured was manufactured by defendant FMC without a guard at the in-running nip point at the head pulley drum.

As coal was being conveyed, coal dust would accumulate on the drum. On February 23, 1985, the head pulley drum on the FMC conveyor had become clogged with coal and was responsible for a major coal spill. Gander had been taught to clean the drum with a fox tail brush. As Gander proceeded to clean the drum with a fox tail brush, the rolling drum caught the brush and pulled Gander's forearm into the device before he was able to let go. Gander's right arm was severed at the elbow when it came into contact with a shear guard.

Gander was taken to a hospital where his arm was reattached. However, his arm is useless. Attempts at vocational rehabilitation were unsuccessful and Gander was discharged from work in August of 1987. He now does volunteer work at a local hospital.

Uncontradicted figures for lost wages, past and future, establish damages in excess of Two Million Dollars. Gander's lost wages for his work life expectancy of twenty-seven years

would be close to One Million Seven Hundred Thousand Dollars. R., Vol. 1, 318. Alternative lost wage scenarios ranged from One Million Eight Hundred Thousand Dollars to Two Million Two Hundred Thousand Dollars. *Id.* at 320-22.

Gander's physicians testified that his right arm was almost useless. He has no use of his fingers, which frequently swell and develop ulcers. Gander has permanent, burning pain in his fingers, which are otherwise numb. He must wear a splint to support his wrist and a glove to keep down the swelling in his hand. The arm is subject to injury and heals slowly. These injuries are permanent. R., Vol. 2 at 34-59.

Gander's psychiatrist testified that his injuries have caused substantial psychological problems. Initially, Gander was severely depressed and suicidal and had to be hospitalized for treatment. R., Vol. 2 at 75. Gander is still under monthly psychiatric treatment with his symptoms in a constant state of flux. R., vol. 2, 75, 80. While Gander is no longer suicidal, the scars on his body from skin grafts, nerve and vein transplants, and muscle harvesting are devastating to Gander's self-image. R., Vol. 2 at 77. Gander suffers from insomnia, is easily frustrated and irritable, has decreased interest in intimacy with his wife, and harbors feelings of hopelessness and worthlessness with a poor outlook for the future. R., Vol. 2 at 90. The psychiatrist testified that Gander was totally disabled on the basis of his psychiatric difficulties alone. R., Vol. 2 at 84. Thus, the Court of Appeals held that there was substantial evidence supporting the jury's calculation of total damages at Two Million Dollars. 892 F.2d at 1380. See Appendix, A-12.

SUMMARY OF ARGUMENT

I and II. This Court's decision in *Liepelt* does not mandate jury instructions on the effect of taxes on future lost earnings and the non-taxability of a jury award for personal injuries in a *diversity action* based on product liability law of Missouri. Missouri law precludes such jury instructions. The Eighth Circuit correctly ruled this issue. Petitioner failed to request any "tax" instructions in the District Court and made no complaint in the Court of Appeals regarding the absence of such instructions. Therefore, Petitioner does not present an appropriate issue for review by this Court.

III and IV. *Liepelt* does not mandate cross-examination of plaintiff's economist regarding income tax effects on lost future earnings in a *diversity action* under Missouri law. Missouri law precludes such cross-examination. The Eighth Circuit correctly ruled this issue. The relevant District Court ruling actually *allowed* Petitioner to conduct such cross-examination with the caveat that plaintiff would be granted a mistrial if plaintiff proved the ruling to be wrong. Petitioner *voluntarily* made no further efforts at such cross-examination and made no offer of proof. Therefore, Petitioner does not present an appropriate issue for review.

V and VI. Under Missouri law of product liability, comparative negligence of the plaintiff does reduce damages under a strict liability theory. Jury instructions on those issues were held to be clear and correct by the Eighth Circuit. A new trial is not re-

quired because of a closing "note" on a verdict form (not an instruction as represented by Petitioner) which the Court of Appeals also held was legally correct but may have been "potentially confusing". Petitioner failed to object to that "note" at trial (Rule 51, Fed.R.Civ.Pro.) and failed to tender an alternative verdict form or clarifying language for the "note". The Court of Appeals correctly ruled this issue. Therefore, Petitioner does not present an appropriate case for review.

ARGUMENT

I

THIS CASE INVOLVES A DIVERSITY ACTION FOR PERSONAL INJURIES BASED ON PRODUCT LIABILITY LAW OF MISSOURI. APPLICABLE MISSOURI LAW PRECLUDES JURY INSTRUCTIONS ON THE EFFECT OF TAXES ON FUTURE LOST EARNINGS AND THE NON-TAXABILITY OF A JURY'S AWARD OF DAMAGES. THIS COURT'S DECISION IN *LIEPELT* DOES NOT MANDATE SUCH INSTRUCTIONS IN DIVERSITY ACTIONS DETERMINED UNDER STATE LAW.

Petitioner, FMC Corporation (hereinafter "FMC"), inappropriately lumps together issues regarding evidence, argument, and jury instruction involving the effects of federal income tax on a plaintiff's lost income stream and on the non-taxability of a jury's damage award. FMC apparently does so in an attempt to obfuscate the issues in order to obtain review by this Court despite the fact that many of these issues were neither preserved in the trial court nor raised in the Court of Appeals. FMC also represents to the Court that the decision of the Court of Appeals in this case is in conflict with the decision of the Seventh Circuit in *In Re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189 (7th Cir.), cert. denied, 464 U.S. 866, 78 L.Ed.2d 178, 104 S.Ct. 204 (1983). FMC conveniently fails to cite to this Court the vast body of law decided by the United States Courts of Appeals to the effect that taxability instructions in diversity cases are questions of state law and that such instructions are not mandated in diversity cases by this Court's decision in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980).

This case involves a diversity action for personal injuries based on product liability law of the State of Missouri. Plaintiff, Todd Gander, had his arm literally torn off by an unguarded piece of machinery manufactured by FMC.

Applicable Missouri law precludes jury instructions on the effect of taxes on future lost earnings and the non-taxability of a jury's award of damages. *Missouri Approved Jury Instructions,* Third Edition, MAI 4.01; *Kenton v. Hyatt Hotels Corp.,* 693 S.W.2d 83 (Mo. 1985); *Tennis v. General Motors Corp.,* 625 S.W.2d 218 (Mo.App. 1981); and *Senter v. Ferguson,* 486 S.W.2d 644 (Mo.App. 1972).

This Court's decision in *Liepelt* determined that, in FELA actions, the jury should receive evidence of the effect of income taxes on lost wages and an instruction on the non-taxability of a final award. The decision in *Liepelt* was premised upon the federal questions involved in FELA cases and the need for uniformity in cases decided under federal law.

The rationale of *Liepelt* was further delineated by this Court in *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981). In *Gulf Offshore Co.,* this Court remanded a case under the Outer Continental Shelf Lands Act (43 U.S.C., Sec. 1331 et. seq.) to the Texas Court of Civil Appeals for a determination of whether Louisiana law required a "non-taxability instruction" and, if it did not, whether *Liepelt* displaced the state rule in an OCSLA case. That case was remanded with directions from this Court that, if it was error to refuse such an instruction, the state court could then address arguments that failure to give such an instruction did not constitute prejudicial error.

Numerous decisions of the United States Courts of Appeals have expressly recognized that taxability instructions are questions of state law in diversity cases and that *Liepelt* does not mandate such instructions in diversity actions determined under state law. *Gander v. FMC Corp.,* 892 F.2d 1373 (8th Cir. 1990); *Adams v. Fuqua Industries, Inc.,* 820 F.2d 271 (8th Cir. 1987); *Bartak v. Bell-Galyardt & Wells, Inc.,* 629 F.2d 523 (8th Cir. 1980); *Losey v. North American Philips Consumer Electronics Corp.,* 792 F.2d 58, 61-62 (6th Cir. 1986); *Estate of Spinosa,* 621 F.2d 1154, 1158-59 (1st Cir. 1980); *Vasina v. Grumman*

Corp., 644 F.2d 112, 118 (2d Cir. 1981); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 50-51 (2d Cir. 1984); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1096-97 (5th Cir. 1980), cert. denied, sub nom *Bromley Corp. v. Cortese*, 450 U.S. 981, 100 S.Ct. 1516, 67 L.Ed.2d 816 (1981); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1045 (5th Cir. 1984), cert. denied, 470 U.S. 1051, 105 S.Ct. 1739, 84 L.Ed.2d 814; *Fenasci v. Traveler's Insurance Co.*, 642 F.2d 986, 989 (5th Cir.), cert. denied, 454 U.S. 1123, 100 S.Ct. 971, 71 L.Ed.2d 110 (1981).

A close reading of the Seventh Circuit decision in *In Re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189, 1200 (7th Cir. 1983), indicates that there is no real conflict among the circuits. In that case, the Seventh Circuit reviewed Illinois law and stated its belief that Illinois decisions were based on a misapprehension of federal law and that the giving of a "non-taxability instruction" would be harmless at most. *Id.* 701 F.2d 1199, 1200. The Seventh Circuit also recognized that its conclusion would be different if Illinois interpreted its own substantive law to preclude such an instruction. *Id.* 701 F.2d at 1200, n. 7. The Seventh Circuit did not hold that federal law mandated such an instruction in a diversity case. Rather, the Seventh Circuit held that the District Court was free to give the tax instruction despite contrary state procedure. *Id.* 701 F.2d 1200.

Therefore, under Supreme Court Rule 10.1(a), there is no "conflict" among the circuits on these issues. Rather, the Circuit Courts of Appeals are relatively uniform and support the decision of the Eighth Circuit in this case.

II

PETITIONER FAILED TO TENDER ANY "INCOME TAX" INSTRUCTIONS TO THE TRIAL COURT AND MADE NO COMPLAINT IN THE COURT OF APPEALS REGARDING THE ABSENCE OF SUCH INSTRUCTIONS. THEREFORE, THIS CASE IS NOT APPROPRIATE FOR REVIEW BY CERTIORARI ON THAT ISSUE.

Supreme Court Rule 15.1 requires that a Brief in Opposition to a Petition for Certiorari should address any perceived misstatements of fact or law which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. FMC seeks review by certiorari by contending that *Liepelt* mandates the giving of "taxability instructions". However, FMC completely fails to advise this Court that FMC totally failed to preserve any such issue in either the District Court or in the Court of Appeals.

FMC requested *no* instructions regarding income tax effects on lost future income.

FMC requested *no* instruction on the non-taxability of a jury's award of damages.

FMC made *no* objection to the damage instruction given by the trial court at the request of plaintiff.

The only instruction relating to damages tendered by FMC at trial was a "present value" instruction patterned after *Federal Jury Practice & Instructions*, Devitt, Blackmar & Wolff, Fourth Edition, Vol. 3, Sec. 85.11. This "present value" instruction had absolutely no relationship to, and did not mention, taxes.

In its Brief on Appeal before the Eighth Circuit, the *only* issue raised by FMC related to cross-examination of plaintiff's damage witnesses and closing argument. Quoted portions from FMC's "Brief for Appellant", consisting of Question 3 from

the Questions Presented section, and Point III from the Argument section, are as follows:

> **Question 3:** Whether counsel for FMC Corporation should have been permitted to cross examine plaintiff's damages witnesses regarding the effects of ineome tax upon plaintiff's lost income stream, and to mention those effects during closing argument. (Brief for Appellant, page 3.)

POINT III

> COUNSEL FOR FMC SHOULD HAVE BEEN PERMITTED TO CROSS EXAMINE PLAINTIFF'S DAMAGES WITNESSES REGARDING THE EFFECTS OF INCOME TAX UPON THE PLAINTIFF'S LOST INCOME STREAM, AND TO ARGUE THOSE EFFECTS DURING CLOSING ARGUMENT. (Brief for Appellant, page 17)

As is obvious, FMC completely failed to preserve any allegation of error regarding instructions relating to taxes in either the District Court or in the Court of Appeals.

For these reasons, review by certiorari would not be appropriate.

III

MISSOURI LAW PRECLUDES CROSS-EXAMINATION REGARDING INCOME TAX EFFECTS ON LOST FUTURE EARNINGS. FEDERAL LAW DOES NOT MANDATE SUCH CROSS-EXAMINATION.

The Eighth Circuit quite properly held that Missouri law precludes cross-examination and closing argument regarding income tax effects on lost future earnings. *Gander v. FMC Corp.*, 892 F.2d 1373, 1383 (8th Cir. 1990). In *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42, 45 (1952); the Missouri Supreme Court held that:

> The trial court did not err either in refusing to permit defendant to cross-examine the plaintiff's actuarial witness relative to income tax liability or in refusing to permit defendant to argue to the jury that in arriving at the amount of its award it should consider only the amount of future earnings lost to plaintiff after deduction of income taxes for which he would have been liable had he continued his employment without injury.

In this regard, Missouri follows the majority rule set forth in the Restatement (Second) of Torts, Sec. 914(a)(2) (1977), which provides as follows:

> "The amount of an award of tort damages is ordinarily not diminished because of the fact that, although the award is not of itself taxed, all or part of it is to compensate for the loss of future benefits that would have been subject to taxation."

For all of the reasons set forth in Point I of this Brief, federal law does not mandate such cross-examination or closing argument in a diversity case.

FMC attempts to rely on *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986). *Nesselrode* did not involve any issue of cross-examination or closing argument regarding income tax effects on lost future earnings. Rather, *Nesselrode* involved alleged error in the use of a table which allegedly did not contain reductions to present value. *Id.* at 385-386. This "present value" issue in *Nesselrode* was decided in light of the fact that the defendant itself failed to present any evidence of present value. *Id.* at 387. In deciding this issue, the Missouri Supreme Court mentioned *in passing* that cross-examination was conducted with regard to the fact that the decedent's projected stream of lost income did not take into consideration his anticipated income tax obligations. *Id.* at 388.

The propriety of this cross-examination was not at issue in *Nesselrode* and was not addressed by the Missouri Supreme Court. The decision in *Dempsey* was not even discussed in *Nesselrode*. Certainly the decision in *Dempsey* was not overruled by *Nesselrode*.

The Eighth Circuit properly decided this issue and certiorari would be inappropriate in this case.

IV

THE TRIAL COURT RULED THAT IT WOULD ALLOW PETITIONER TO CROSS-EXAMINE PLAINTIFF'S ECONOMIST ON INCOME TAX EFFECTS ON FUTURE EARNINGS, AND ALSO STATED THAT IT WOULD GRANT A MISTRIAL IF PLAINTIFF COULD SHOW SUCH CROSS-EXAMINATION WAS IMPROPER. PETITIONER VOLUNTARILY CHOSE TO MAKE NO FURTHER EFFORTS TO CROSS-EXAMINE THE ECONOMIST ABOUT INCOME TAXES. THEREFORE, THIS CASE IS NOT APPROPRIATE FOR REVIEW BY CERTIORARI ON THAT ISSUE.

Despite the fact that the Eighth Circuit generously considered the merits of FMC's argument regarding cross-examination of plaintiff's economist on income tax effects on future earnings, *FMC fails to advise this Court that the ruling of the trial court was actually in FMC's favor.* The trial transcript on appeal contains the following exchange and ruling by the trial court. (R., Vol 1, pages 344, line 14 through 345, line 12).

" THE COURT: Mr. Hullverson says as a matter of law that you can't get into it.

MR. HULLVERSON: That's correct.

MR. VENKER: I think that's wrong, Judge, and I think it would hamper me prejudicially with an economist present to not be able to question him in that regard. That is, if there were no economist maybe we couldn't get an instruction on it at the end of the case.

THE COURT: Well, if you do I'll go ahead and let you — Mr. Hullverson shows that I'm wrong I'll grant a mistrial at your request, okay?

MR. HULLVERSON: Okay.

THE COURT: Okay.

MR. VENKER: So we're talking about —

THE COURT: I'm going ahead and letting you based on your representation, but if you're wrong I'm going to grant a mistrial.

MR. VENKER: Your Honor —

THE COURT: Okay?

MR. VENKER: — are we talking about income tax or present value or both?

THE COURT: Whatever you want to do.

MR. VENKER: All right."

The trial court indicated that it would allow FMC to do whatever it wanted to do with regard to cross-examination on the subject of income taxes and present value. The trial court cautioned that if plaintiff could show that such cross-examination was improper, a mistrial would be granted.

FMC voluntarily chose to make no further efforts to cross-examine the economist about income taxes.

On such a record, this case clearly is not appropriate for review by certiorari on that issue.

The only other incident regarding income taxes which took place at trial involved plaintiff's witness, Crawford. Crawford

was a union representative who testified briefly about wages earned by coal conveyor operators. FMC attempted to ask whether Crawford's income figures were "net or gross". An objection to this question of this witness was sustained. (R., Vol. 2, 70-71). The trial court was well within its discretion in refusing to allow this cross-examination at this juncture of the trial. Federal Rules of Evidence, Rule 611(b). Such evidence would have been completely out of context and without any opportunity for explanation. Plaintiff's economist had concluded his testimony and FMC had no economist waiting to testify.

Crawford was a lay witness - basically a records custodian. No foundation was established by FMC that this witness was competent to testify about income taxes. Even if the witness had been allowed to respond that the wage rate for coal operators was a "gross" rate, such testimony would have been in a vacuum, unrelated to any meaningful testimony by any economist or other witness.

FMC fails to advise this Court that FMC never even attempted to make an offer of proof with either one of these witnesses. Federal Rules of Evidence, Rule 103(a)(2).

Therefore, FMC was not the victim of an adverse ruling by the trial court in connection with the economist's testimony. The only relevant ruling made by the trial court was actually in favor of FMC. No appropriate issue was before the Appellate Court. Certainly, there is no appropriate issue before this Court for review by certiorari.

V

MISSOURI LAW PERMITS NO REDUCTION OF DAMAGES AWARDED UNDER A STRICT LIABILITY THEORY BY ANY PERCENTAGE OF FAULT ASSESSED TO PLAINTIFF UNDER A COMPARATIVE NEGLIGENCE THEORY. THE COURT OF APPEALS EXPRESSLY RECOGNIZED THAT THE JURY INSTRUCTIONS ON THOSE ISSUES WERE CLEAR AND CORRECT. A NEW TRIAL IS NOT REQUIRED BY REASON OF A CONCLUDING "NOTE" IN A VERDICT FORM (NOT AN INSTRUCTION AS REPRESENTED BY THE PETITIONER TO THIS COURT) WHICH THE COURT OF APPEALS HELD WAS LEGALLY CORRECT BUT "POTENTIALLY CONFUSING".

This product liability case was submitted to the jury on alternative theories of strict liability and negligence against defendant FMC in accordance with Missouri Supreme Court approved Illustration 35.15 (effective January 1, 1988). *Missouri Approved Jury Instructions,* Third Edition, 1989 Pocket Part, pages 122-133. MAI Illustration 35.15 is the Missouri Supreme Court approved method for submission of negligence and strict liability where comparative fault is applicable only to the negligence theory in accordance with the decision in *Lippard v. Houdaille Industries,* 715 S.W.2d 491 (Mo. 1986).

In *Lippard,* the Missouri Supreme Court stated as follows:

> "We conclude that there should be no change in the Missouri common law rule, as established in the *Keener* opinion (citation omitted), that the plaintiff's contributory negligence is not at issue in a products liability case. *It should neither defeat nor diminish recovery* . . . if the product is a legal cause of injury, then even a negligent plaintiff should be able to recover." (715 S.W.2d at 493, emphasis supplied).

> **"We adhere to the view that distributors of 'defective products unreasonably dangerous' should pay damages for injuries caused by the products, without reduction because a plaintiff may have been guilty of a degree of carelessness." (715 S.W.2d at 494).**

The Missouri Supreme Court clearly has indicated the viability of submission of alternative theories of strict liability and negligence in a products liability case. *Lippard v. Houdaille Industries,* 715 S.W.2d at 494, n. 3; and *Nesselrode v. Executive Beachcraft, Inc.,* 707 S.W.2d 371, 373 (Mo. 1986). Likewise, the decisions of the Eighth Circuit have recognized that the submission of multiple theories of negligence and strict liability is appropriate under Missouri law. *Vanskike v. ACF Industries, Inc.,* 665 F.2d 188 (8th Cir. 1981); and *Lewy v. Remington Arms Co., Inc.,* 836 F.2d 1104, 1106 (8th Cir. 1988).

In this case, the jury clearly found in favor of plaintiff and against the defendant on the strict liability theory. On the negligence theory, the jury determined that both FMC and the plaintiff were negligent. On this negligence theory, the jury assessed ten percent fault to the defendant and ninety percent fault to the plaintiff. Under *Lippard,* comparative fault applies only to a negligence theory and does not apply to a theory of strict liability. Finally, the jury determined that plaintiff's total damages, disregarding fault on the part of the plaintiff, was Two Million Dollars.

The following statement appears on pages 1 and 2 of the Jurisdictional Statement of FMC's Petition for Writ of Certiorari.

> **"On March 15, 1988, the jury returned a verdict in favor of plaintiff and the trial judge entered judgment in the amount of $200,000.00. See infra Appendix at A-1. On July 13, 1988, the trial judge amended the jury's award to $2,000,000.00 and entered judgment in that amount. See infra Appendix at A-2."**

These characterizations of the verdict and the trial court's actions are misleading. The only amount set forth by the jury in the verdict form was Two Million Dollars ($2,000,000.00). A Two Hundred Thousand Dollar figure nowhere appears in the verdict form as completed by the jury. The trial judge did not amend the jury award. The trial judge merely entered judgment, in accordance with *Lippard,* for Two Million Dollars on the strict liability theory, for Two Hundred Thousand Dollars on the negligence theory, with the proviso that the amount recoverable under the negligence theory would not be in addition to the amount recoverable under the strict liability theory. See Appendix at A-24-25. This judgment was perfectly correct under Missouri law. FMC inappropriately palters by referring to the jury verdict as one "for Two Hundred Thousand Dollars" and by making it appear that the trial judge entered an additur.

FMC concedes that the only difficulty with the verdict form is contained in the closing "note". See Appendix at A-7. In seeking certiorari on this basis, FMC conveniently omits any discussion of the actual jury instructions in this case. In its opinion in this case, 892 F.2d at 1378, the Eighth Circuit expressly held that the actual jury instructions in this case "were quite clear that the jury finding on comparative fault does not so apply" to the strict liability theory. See Appendix at A-10. The Eighth Circuit stated that the actual jury instructions properly instructed the jury that comparative fault principles do not apply to strict liability claims. The Eighth Circuit also recognized that the actual jury instructions advised the jury that the percentage of fault assessed to plaintiff under the negligence theory would *only* affect the recovery on that negligence theory. See Appendix at A-9.

The Eighth Circuit utilized the appropriate standard of appellate review with regard to jury instructions when it stated:

> "As a whole, the instructions correctly and specifically instructed the jury about the ambiguities the [verdict] form

> may have created. Given this correct and explicit instruction, it is mere speculation that the jury calculated total damages at $2,000,000.00 in anticipation of a reduction for plaintiff's comparative fault on the negligence claim." 892 F.2d at 1378-79. See Appendix at A-10.

Given this very explicit finding by the Eighth Circuit, there is simply no issue presented which is worthy of consideration by this Court on a Petition for Writ of Certiorari under Supreme Court Rule 10.1(a). This is particularly true, as more fully set forth in Point VI of this Brief, because FMC failed to make any specific objection to the closing "note" in the verdict form under Rule 51, Fed.R.Civ.Pro., and failed to offer an alternative verdict form or clarifying language.

VI

THE ISSUE INVOLVING THE CONCLUDING "NOTE" IN THE VERDICT FORM DOES NOT PRESENT AN APPROPRIATE CASE FOR REVIEW BY CERTIORARI WHERE THE PETITIONER MADE NO SPECIFIC OBJECTION TO THAT "NOTE" UNDER RULE 51, FED.R.CIV.PRO., AND FAILED TO TENDER AN ALTERNATIVE VERDICT FORM OR CLARIFYING LANGUAGE.

At trial, the only comment that counsel for FMC had with respect to the verdict form is reflected at R., Vol. 3, page 209, as follows:

> " MR. VENKER: The only objection that I had to it, Your Honor, was that I stated earlier and that is just that I think with two verdict directors on two different theories there should be two verdict forms. I mean I've seen this this morning for the first time and haven't had a chance to draft my own, but I would just say simply that they ought to be separate and not put together in the same verdict form."

Rule 51, Fed.R.Civ.Pro. provides in pertinent part, as follows:

> " . . . No party may assign an error the giving or the failing to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection . . ."

The only complaint relating to alleged instructional error made by petitioner FMC, pertains to the concluding "Note" on the verdict form used at trial. At no time during trial did FMC ever raise any issue with regard to that concluding "note". The only objection made at trial by FMC with respect to the verdict form was the suggestion by FMC that the claims based on theories of negligence and strict liability should be submitted by way of separate verdict forms on each theory.

As such, FMC has waived any allegation of error with respect to that verdict form on the grounds asserted in its Petition. *Rouse v. Chicago, Rock Island & Pacific Railroad Co.*, 474 F.2d 1180, 1184 (8th Cir. 1973); 9 C. Wright & A. Miller, *Federal Practice & Procedure*, Sec. 2551 and 2553 (1971).

> "A party may not state one ground when objecting to an instruction and attempt to rely on a different ground for the objection on appeal or on a motion for a new trial. Nor will an objection to one part of the charge permit a party to assert error later in a different part of the charge." *Id.* at 645, 646.

FMC had every opportunity to appropriately object to the concluding note in the verdict form. It failed to do so. FMC had every opportunity to tender an alternative verdict form. It failed to do so. FMC had every opportunity to suggest a clarification or amendment to the verdict form used by the District Court. It failed to do so. FMC had every opportunity to tender a special verdict form submitting special interrogatories recommended for a product liability case submitting

both negligence and strict liability, which may be found at *Federal Jury Practice & Instructions,* Devitt, Blackmar & Wolff, Vol. 3, Fourth Edition, Sec. 74.12. FMC failed to do so.

At no time did FMC object or attempt to clarify the "note" which it now contends would have made the verdict form more clear to the jury. Also, at no time during final argument did FMC ever explain to the jury the effect of the joint submission of negligence and strict liability theories. FMC had every opportunity to argue these issues to the jury. FMC failed to do so.

Under these circumstances, this case does not present an appropriate issue for review by certiorari by this Court. This is especially true by virtue of the fact that the Eighth Circuit expressly held that the concluding "note" in the verdict form was legally correct and did not misstate Missouri law. 892 F.2d at 1377. See Appendix at A-8.

CONCLUSION

For the foregoing reasons, FMC's Petition for Writ of Certiorari should be denied.

Given the numerous omissions of fact and law by FMC in its Petition for Writ of Certiorari, this Court may wish to consider application of Supreme Court Rule 42.2 or a direction to the District Court to consider application of Rule 11, Fed.R.Civ.Pro.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823

Todd Gander,
Appellee,

v.

FMC Corporation,
Appellant.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: September 13, 1989

Filed: January 12, 1990

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

FMC Corporation appeals a judgment in favor of Todd Gander for $2,000,000, entered on July 13, 1988, following a jury trial. Gander's theories of recovery for personal injuries sounded in both strict liability in tort and negligence, and the jury found in favor of Gander on both claims. The jury also

assessed Gander's comparative fault on the negligence claim at 90%. On appeal, FMC argues that the verdict form was confusing and misstated the law, and that the district court should have allowed FMC to cross-examine Gander's witnesses about the effects of income tax assessments on Gander's lost income. While we have some reservations about the verdict form, we affirm.

I. BACKGROUND

Gander lost his right arm at the elbow on February 23, 1985, while working for Anheuser-Busch in St. Louis. Gander worked as a coal conveyor operator, and made $34,560 plus benefits in 1984. At the time of trial in 1986, the average pay for coal conveyor operators was $47,891 plus benefits.

As a coal conveyor operator, Gander's work entailed shepherding coal from its entry into the plant to the boilers where it was converted to electrical energy. The conveyor belts which transported the coal frequently would ride to one side of their drive drums as the result of coal dust accumulating on the drums. When the conveyor belt rode to one side, it would often climb the wall, causing coal spills.

On February 23, 1985, Gander was working near a head pulley drum which had become clogged with coal, and which was partly responsible for a major coal spill. Gander had been taught to clean the drum with a fox tail brush, without shutting off the system. Gander thus proceeded to clean the drum with the fox tail brush, but the rolling drum caught the fox tail brush, pulling Gander's forearm into the device before he was able to let go. The rolling drum literally lifted Gander off the ground, and his arm was severed at the elbow when it came into contact with a shear guard. Fellow workers took Gander to Barnes Hospital where his arm was reattached.

Although Gander's surgery was successful to the extent that he still has his right arm, he testified at trial that the arm is

essentially useless. "It's just like an ornament hanging on, it's no good." Trial Transcript, vol. 1, at 122. He has only limited movement in his shoulder and must wear a brace to keep his wrist straight. It otherwise flops limply. Gander has no feeling in his fingers, has lost his fingernails, and must wear a glove on his hand to prevent swelling. Gander's useless right arm causes him problems with minor things, like buttoning the top of his shirt or tying his shoe laces; Gander testified that these problems cause him to be frustrated and irritable. Moreover, attempts at vocational rehabilitation were unsuccessful, and Gander was discharged from Anheuser-Busch on August 31, 1987. He now does some volunteer work at a local hospital. The trial testimony indicated that the injury has enormously changed Ganders life.

As indicated, the case was tried to a jury on theories of strict products liability and negligence. The single verdict form submitted to the jury contained reference to both theories. Part I required a verdict on the strict liability claim. Part II required the jury to assess the comparative fault of the plaintiff and the defendant in the event that it found for the plaintiff or the negligence claim. Part III required the jury to assess total damages. The jury found for Gander on both theories, assessed Gander's fault at 90%, and found total damages to be $2,000,000.

After the jury was dismissed, however, the district court expressed doubt about whether the jury verdict was for $2,000,000 or for $200,000; i.e., $2,000,000 total damages reduced by the 90% fault assessed to Gander. The district court initially entered judgment for $200,000. On Gander's motion to amend the judgment, however, the court decided that Gander was entitled to $2,000,000 on the strict liability claim, which could not be reduced by Gander's comparative fault under Missouri law. This appeal followed.

II. DISCUSSION

A. The Verdict Form

FMC argues on appeal that the district court erred both in submitting to the jury Gander's verdict form, which it argues was confusing and inaccurate, and in amending judgment. While the arguments are closely related and both ultimately turn on whether the verdict form correctly stated Missouri law, we treat the arguments separately.

The verdict form was submitted by Gander, and was taken from the Missouri Approved Jury Instructions. MAI 35.15 illustration (3d ed. Supp. 1989) (the form is indicated as Verdict A, and is taken from MAI 36.01 and 37.07). The form used is approved, at least as an illustration, by the Missouri Supreme Court for the submission of both strict liability and negligence claims, and was new at the time of trial. Brief for Appellant at 9. It contains three parts,[1] the first dealing with the strict liabili-

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[1] Beginning with Part I, the verdict form reads as follows:

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of: _____

* * *

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

* * *

ty claim, the second with comparative fault on the negligence claim, and the third with total damages. The difficulty the district court had, and the arguable error in the form, stems from the closing note, which explains the reduction in damages for plaintiff's comparative fault on the negligence claim.

After the jury had been dismissed, FMC remarked that the verdict appeared to be $200,000; i.e., $2,000,000 total damages reduced by the 90% fault assessed to Gander. Trial Transcript, vol. 3, at 270. Gander argued that the verdict was for 12,000,000, since the jury found for Gander on the strict liability claim, which could not be reduced by Gander's comparative fault. *Id.* at 272. The district court replied: "Not based on the note on part three." *Id.* After quoting the note, the court continued: "This is directing me to reduce that by 90 percent." *Id.* at 274. The district court then entered judgment for $200,000.

> NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Upon Gander's motion to amend, however, the district court decided that it had improperly reduced the total damages by the

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PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be _____

* * *

NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

percentage of comparative fault assessed to Gander. "Inasmuch as this is a case in which comparative negligence principles apply only to the jury's determination on the negligence claim and not to the strict liability claim, the jury's findings as reflected on the verdict form entitle plaintiff to a judgment in the amount of Two Million Dollars ($2,000,000)." Memorandum and Order, No. 87-1155C(6), July 13, 1988, at 2.

To the extent that FMC argues that the district court erred in amending its judgment, we disagree. "The decision to grant or deny a Rule 59 motion is committed to the sound discretion of the trial court." *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 165 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987); *Slater v. KFC Corp.*, 621 F.2d 932, 939 (8th Cir. 1980). Under Missouri law, which we are bound to apply in this diversity case, *see Walker v. Paccar, Inc.*, 802 F.2d 1053, 1055 (8th Cir. 1986), the district court was correct in amending the judgment. Missouri law is clear that a verdict resting on a strict liability claim cannot be reduced by a plaintiff's comparative fault. In *Lippard v. Houdaille Indus.*, 715 S.W.2d 491 (Mo. 1986), the Missouri Supreme Court held that "the plaintiff's contributory negligence is not at issue in a products liability case." *Id.* at 493. The court explained that negligence on the part of plaintiff should neither prohibit nor reduce plaintiff's recovery on a strict liability claim. "We adhere to the view that distributors of 'defective products unreasonably dangerous' should pay damages for injuries caused by the products, without reduction because a plaintiff may have been guilty of a degree of carelessness." *Id.* at 494. As defense counsel admitted at oral argument, the judgment of $200,000 under the strict liability theory was clearly incorrect as a matter of Missouri law. Therefore, we find no abuse of discretion by the district court.

This does not, however, end the matter. FMC's argument is better stated in terms of the verdict form's correctness. That is, the fact that the amended judgment properly reflected Missouri law does not mean that the verdict form itself did not misstate

Missouri law or unduly confuse the jury. Thus, FMC argues that the form was incorrect as a matter of law, or, in the alternative, that it was so confusing that the intent of the jury is unclear. The jury may, indeed, have been misled by the closing note, which could be read (as first read by the district court) to apply comparative fault to the strict liability claim as well as to the negligence claim. On its face, the note is not specifically limited to one negligence claim. Nor does the note specifically apply to the strict liability claim. Because of this ambiguity, the jury, according to FMC, may have been led to conclude that total damages would be reduced by any percentage of fault assessed to Gander, even though it found in Gander's favor on the strict liability claim. Hence, FMC argues, the jury probably intended that Gander receive only $200,000, and thus assessed total damages of $2,000,000 because it thought that total damages would be reduced by 90%. We must, therefore, consider whether the verdict form is legally incorrect or unduly misleading.

While it is a close question, we do not think that the verdict form misstates Missouri law. FMC agreed at oral argument that the difficulty with the form stems from the closing note, which, as indicated, can be read to require a reduction, based on plaintiff's comparative fault on the negligence claim, in the strict liability claim. Although the note leaves open this possibility, it does not, as the district court initially thought, *require* it. Because of its grammatical structure and location, the note is somewhat misleading. The note can be read to indicate a connection between a finding of contributory fault on the negligence claim and a reduction in total damages. *If* the jury assesses a percentage of fault to any defendant, *then* "the judge *will reduce*" total damages accordingly. The reduction in damages thus can be caused by the jury assessing fault, regardless of any finding on the strict liability claim. While this is a possible reading of the note, it is not a required reading.

However, as a matter of law, the note is not incorrect; it is simply unclear. Given that Missouri law is clear that the judge

cannot apply comparative negligence principles to the strict liability claim, the strict liability claim will, in fact, be unaffected by any percentage of fault assessed to plaintiff on the negligence claim. The note does not require otherwise, and thus is not legally incorrect. It does not misstate Missouri law.

The verdict form is, however, at least potentially confusing to the jury.[2] We must, therefore, consider whether the form, taken together with the instructions to the jury, is so misleading or confusing that the jury verdict cannot stand. In determining whether the verdict form is confusing, we must consider it in light of the instruction given. *See United States v. Hines,* 728 F.2d 421, 427 (10th Cir.), *cert. denied,* 467 U.S. 1246 (1984). It is enough if the "charge as a whole . . . state[s] the governing law fairly; technical imperfections or a lack of absolute clarity will not render the instructions erroneous." *Toro Co. v. R & R Products Co.,* 787 F.2d 1208, 1215 (8th Cir. 1986). We find that the jury was correctly and adequately instructed on Missouri law, and, therefore, that the verdict form, not clearly wrong, also is not so confusing that the jury verdict must be upset.

The important inquiry is whether the jury was properly instructed that damages were to be calculated regardless of any fault assessed to plaintiff on the negligence claim. Initially, we note that the verdict form itself is clear and correct on this matter. In Part III, in which the jury finds total damages, the form states: "We, the jury, find the total amount of plaintiff's

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[2] Although we hold that the verdict form is technically correct, and that we cannot set aside the jury verdict in this case, we recommend that the form not be used by the federal district courts of this circuit as presently written. The form could be substantially clarified by simply eliminating the concluding note, which FMC agreed at oral argument is the main problem with the form. MAI 37.03 as written in the MAI 35.15 illustration clearly and correctly instructs the jury on the same matters which the concluding note attempts to cover. The note is, therefore, unnecessary. If a note is deemed to be required, several alternative versions that clarify the problem readily come to mind.

damages *disregarding any fault on the part of plaintiff* to be ____" (emphasis added). This instruction that comparative fault is *not* to be considered in calculating total damages is much clearer than is any inference from the concluding note that might lead the jury to inflate total damages in anticipation of a reduction for plaintiff's comparative fault on the negligence claim. Instruction number 18 further provided that, if the jury found in favor of Gander on the strict liability claim, or assessed a percentage of fault to FMC on the negligence claim, then

> disregarding any fault on the part of plaintiff, you must determine the total amount of his damages to be such sum as will fairly and justly compensate him for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

Moreover, the jury was specifically instructed, through instruction number 18, that it should calculate total damages regardless of plaintiff's fault. "In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff." Instruction number 18, *see also* MAI 37.03 (3d ed. 1989 Supp.). Thus, the district court correctly instructed the jury that its function was not to determine the amount of plaintiff's recovery, but to determine the amount of plaintiff's total damages. Any efforts by the jury to calculate damages in terms of plaintiff's recovery would be contrary to the court's instructions.

Not only was the jury properly instructed on its role in calculating damages, but the district court also properly instructed the jury that comparative fault principles do not apply to strict liability claims. Instruction number 18 provided that: "The judge will compute any recovery *on plaintiff's claim for personal injury based on negligence* by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff." Instruction number 18, *see also* MAI 35.15

illustration (3d ed. Supp. 1989) (emphasis added).[3] Thus, while the verdict form may be unclear about whether its concluding note applies to the strict liability claim, the instructions were quite clear that the jury finding on comparative fault does not so apply. As a whole, the instructions correctly and specifically instructed the jury about the ambiguities the form may have created. Given this correct and explicit instruction, it is mere speculation that the jury calculated total damages at $2,000,000 in anticipation of a reduction for plaintiff's comparative fault on the negligence claim.

Moreover, mere speculation that a jury verdict may have been based on the jury's own misunderstanding of the law, even though properly instructed, is an insufficient basis on which to upset a jury verdict. "It is well settled that a jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict." *Chicago, Rock Island & Pacific R.R. v. Speth,* 404 F.2d 291, 295 (8th Cir. 1968). In *Speth,* the jury assessed plaintiff's contributory negligence at 40% and awarded $16,000 in damages. The district court, *sua sponte,* asked the jury whether its damage award was net or gross. The jury responded that its calculation was a net figure, compensating for plaintiff's contributory negligence. The jury thus intended for plaintiff to recover $16,000. When the district court sent the jury back to recalculate damages, it returned with a figure of $40,000. On appeal, this court reversed and remanded for a new trial on the issue of damages. *Id.* at 296. This is not to say, however, that when a jury verdict "on its face shows a clear disregard for the court's in-

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[3]MAI 37.03, from which the illustration is drawn, differs materially from the illustration and from the instruction given at trial. MAI 37.03 does not discuss alternate theories of liability submitted to the jury, and thus the specific reference to Gander's claim based on negligence, emphasized in the text above, varies from MAI 37.03.

structions," *id.* at 295, it cannot be corrected. But given correct instruction on the law and no clear disregard for that instruction on the face of the verdict, a jury verdict must remain immune from questioning by the district court and from speculation by an appellate court that the verdict may be based on a misunderstanding of the law. Whether the jury misunderstood a correct instruction of the law is an improper subject for mere speculation. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 59.08[4], at 59-115 to 116 (1989) ("a verdict cannot be upset by speculation"); *id.* at 59-127 ("A mere suspicion, however, that the jury has not followed the court's instructions is not sufficient, since that would make the verdict too vulnerable and would needlessly prolong litigation."); *Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 490 (5th Cir. 1987) ("Whether or not the jury misunderstood the charge of the court is not a question to be reexamined after the verdict has been rendered.") (citation omitted).

Our holding finds support as well in the cases which, based on Federal Rule of Evidence 606(b), forbid improper impeachment of a jury verdict. While no improper impeachment occurred in this case, Rule 606(b) establishes that it would have been improper to inquire of the jurors what they really intended by their verdict. In *Karl v. Burlington Northern Ry. Co.*, 880 F.2d 68 (8th Cir. 1989), the jury returned a verdict in a personal injury action in favor of plaintiff. *Id.* at 69. The jury found plaintiff to be 75% at fault, *id.* at 70 n.3, and assessed damages at $273,750. The jury was instructed to assess damages "without taking into consideration any reduction of the plaintiff's claim due to her own negligence." *Id.* at 70 n.4. The district court, however, called the jury foreman at the request of plaintiff's counsel, to determine whether the jury calculated damages without regard for plaintiff's contributory negligence. *Id.* at 71. The jury foreman explained that $273,750 was 25% of what plaintiff asked for, and was what the jury intended plaintiff to recover. *Id.* The district court then amended judgment to reflect actual damages of $1,095,000. *Id.* at 72.

This court reversed the amended judgment. Relying on Rule 606(b), which provides that a juror may not testify about the jury's thought processes during deliberations for purposes of impeaching the verdict, we found the amendment to be improper. *Id.* at 73-74. The impeaching testimony concerned "how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes.' " *Id.* at 74. The testimony, therefore, violated Rule 606(b). Given that "there is no other indication that the jury's first verdict was deficient," *id.* at 75, this court remanded to reinstate the first verdict.

Similarly, while no impeachment of the jury verdict took place in this case, any inquiry by the district court would have been improper. Nor is there any "other indication that the jury's verdict was deficient." We are, therefore, unwilling to speculate that the jury, even though properly instructed, misunderstood the law and, therefore, did not intend to award plaintiff damages of $2,000,000. *See also Scogin v. Century Fitness, Inc.*, 780 F.2d 1316, 1320 (8th Cir. 1985); *Peveto*, 807 F.2d at 489.

Finally we find it persuasive that the evidence of damages in this case is sufficient to support the jury's calculation of damages of $2,000,000. The uncontradicted figures for lost wages, past and future, provided by plaintiff's expert witness, Viscusi, establish damages in excess of $2,000,000. Viscusi testified that at the contract wage for an oiler (all Anheuser-Busch oilers were actually paid more), Gander's lost wages for the next twenty seven years would be $1,395,711. Trial Transcript, vol. 1, at 316. Given Gander's substantial earnings growth of 15% for the four years prior to the accident, *id.* at 307, Viscusi called this figure "ludicrous." *Id.* at 317. Rather, Gander's lost wages were more accurately reflected by considering wages for the average oiler, and would be closer to $1,693,000. *Id.* at 318. Viscusi also gave lost wage scenarios which calculated Gander's wage growth at better than the rate of interest, and gave figures ranging from $1,808,714 to $2,217,761. *Id.* at 320-22. Gander's

counsel used these figures, together with past wage losses, medical bills and pain and suffering, to argue for $3,000,000 in damages. *Id.* vol. 3, at 234-35.[4]

Nor were these figures at all excessive in light of Gander's injury. Gander's physician testified that Gander's right arm is almost useless; that he has no use of his fingers, which frequently swell and develop ulcers; that he has permanent, burning pain in his thumb, index and middle fingers, which are otherwise numb; that he must wear a splint to support his wrist and a glove to keep down the swelling in his hand; that his arm is subject to injury and heals slowly; that the swelling in his arm is likely permanent; and that Gander's arm is 95% permanently disabled. *Id.* vol. 2, at 34-59.

Gander's psychiatrist also testified that the injury has caused substantial psychological problems. When Gander first contacted the psychiatrist, he was severely depressed and suicidal, and had to be hospitalized for treatment. *Id.* at 75. The psychiatrist still sees Gander monthly, and testified that his symptoms are in a constant state of flux. *Id.* at 80. While Gander is no longer suicidal, the scars on his body from skin grafts, nerve and vein transplants, and muscle harvesting are devastating to Gander's self-image. *Id.* at 77. Gander is also easily frustrated and irritable, suffers from insomnia, a decreased interest in intimacy with his wife, feelings of hopelessness and worthlessness, and generally has a poor outlook for the future. *Id.* at 90. Moreover, the psychiatrist testified that, on the basis of psychology alone, Gander should not return to work, where he would likely be frustrated and perhaps disposed to again think of suicide. *Id.* at 84. The psychiatrist testified that Gander's long range outlook is poor. *Id.*

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[4] While counsel said at oral argument that Gander asked for $4,900,000 in damages, the trial transcript contains only the $3,000,000 figure. Trial Transcript, vol. 3, at 234-35.

Thus, given the substantial evidence supporting the jury's calculation of damages at $2,000,000, the correct instruction of the law, and mere speculation that the jury may have intended to award Gander only $200,000, we cannot set aside the jury verdict on the ground that the verdict form was unclear.

B. Income Taxes

FMC next argues that the district court erred in not permitting cross-examination of Gander's witnesses about the effect of income taxes on Gander's lost income. FMC first attempted to cross-examine Viscusi, the economist who testified about Gander's lost wages, FMC asked Viscusi whether the figures he was using were in terms of gross income. Counsel then asked whether Gander would actually get those gross dollars, to which Gander objected. Trial Transcript, vol. 1, at 340-41. At the bench, Gander said that under Missouri law, income tax assessments were inappropriate subjects for cross-examination, and that any contrary holdings from FELA cases could not apply in this diversity case. *Id.* at 342. FMC suggested that it should be able to cross-examine the economist, but when asked by the court whether the law was clear that such cross-examination was permissible, FMC counsel responded: "I think I can." *Id.* at 343. The district court allowed FMC to cross-examine on income taxes, but also said that it would grant a mistrial if Gander were able to show that such cross-examination was improper. *Id.* at 344. FMC made no further efforts to cross-examine Viscusi about income taxes.

The second exchange over income taxes occurred at the bench, when FMC presented to the court *Nesselrode v. Executive Beachcraft, Inc.*, 7070 S.W.2d 371 (Mo. 1986), which FMC said permitted cross-examination on income taxes. Trial Transcript, vol. 2, at 2-3. The district court noted, however, that *Nesselrode* made the law no clearer, and thus adhered to its original ruling. *Id.* at 4.

FMC then attemped to cross-examine Crawford, Gander's witness from the union. Counsel asked Crawford, who testified

about wages earned by coal conveyor operators at Anheuser-Busch, whether his figures were net or gross. Gander objected on the basis of the previous discussions, and this time the objection was explicitly sustained. *Id.* at 70-71.[5]

Finally, FMC tendered an instruction on reduction to present value, which it then linked to the issue of whether the total award was subject to income taxation. *Id.* vol. 3, at 214-15. Gander objected to the instruction and the court agreed, thus precluding FMC from arguing the taxability of the award to the jury. *Id.* at 215.[6] It is somewhat unclear from the objections and the discussions at trial whether FMC appeals from the district court's rulings on cross-examination or from the district court's refusal to instruct the jury that the judgment was not subject to income taxation. In either case, however, Missouri law is clear that the trial court did not err in its rulings.

We must first consider the appropriate governing law, for FMC argues in its brief that these issues are controlled by *Norfolk & Western Ry. v. Liepelt,* 444 U.S. 490 (1980) and *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983). In *Liepelt,* and FELA action, the Supreme Court considered whether the

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[5] While the district court's initial ruling on Gander's first objection to FMC's cross-examination was to conditionally allow it subject to the same sort of cross-examination. Thus, while Gander argued at oral argument that FMC could not appeal from the district court's ruling in its favor, we think that FMC's claim that it was effectively prohibited from undertaking its proposed cross-examination is essentially accurate.

[6] It is clear that the prior discussions related only to cross-examination about the effects of income taxes on Gander's lost income. With reference to the present value instruction and proposed argument on income taxes, however, FMC makes reference to Gander's income tax liability on the judgment, a different matter. Trial Transcript, vol. 3, at 215. FMC may have been concerned that the jury would inflate the judgment to compensate for income taxes if it were not informed that the judgment is not subject to income tax.

jury should receive both evidence of the effect of income taxes on lost wages and an instruction on the taxability of a final award. As to the effects of taxes on a lost income stream, the Supreme Court held that such evidence was neither too speculative nor complex for a modern jury to understand, and thus, was proper to establish after-tax earnings. *Liepelt,* 444 U.S. at 494. The Supreme Court also held that it was error to refuse to give an instruction that the final award was not subject to income tax. *Id.* at 498.[7] FMC argues that these cases establish that the district court erred in its rulings.[8]

These cases, however, are not controlling. We have specifically held, in *Adams v. Fuqua Indus.,* 820 F.2d 271 (8th Cir. 1987), that *Liepelt* does not control in non-FELA cases. In *Adams,* appellant argued that the rationale of *Liepelt* transcends the FELA context and that it should, therefore, apply in diversity actions. *Id.* at 276. This court rejected the argument, and, in considering an instruction on the taxability of an award, held that: "Whether to give or withhold a taxability instruction is a question of state law, which we are bound to follow." *Id.* at 277. More generally, the law is perfectly clear that "when a tort action is brought in federal court pursuant to diversity jurisdiction, basing liability on state law, the court must apply state law in regard to availability and computation of damages." *Id.* (quoting *Losey v. North American Philips Consumer Electronics Corp.,* 792 F.2d 58, 61-62 (6th Cir.

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[7] The Supreme Court relied in part on the Missouri case, *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952). The approved instruction was as follows: "Your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Liepelt,* 444 U.S. at 492.

[8] *Jones & Laughlin* essentially follows *Liepelt,* and holds that in calculating a lost income stream, income tax evidence is appropriate. "Since the damages award is tax-free, the relevant stream is ideally of *after-tax* wages and benefits. *Jones & Laughlin,* 462 U.S. at 534.

(1986)). Moreover, this court in *Adams* specifically rejected a Seventh Circuit case[9] which applied *Liepelt* in a diversity case. We defer instead to "Missouri's right to create its own law free from federal interference." *Adams,* 820 F.2d at 278. Thus, we apply Missouri law.

Missouri law is clear that it is not error for a court to refuse to give an instruction that an award is not subject to income taxation. At one time, Missouri law favored such an instruction. In *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), an FELA case, defendant argued error in the court's refusal to give an instruction that no income tax would be assessed on the judgment. *Id.* at 43-44. The Missouri Supreme Court agreed, finding no reason not to give the instruction, especially given the danger that the jury could incorrectly overcompensate for taxes on the judgment. It was, therefore, error to refuse the instruction. *Id.* at 45. More recent Missouri cases, however, establish that *Dempsey* has been superseded by Missouri Approved Jury Instructions (MAI) outside of the FELA context, and that it is not error to refuse such an instruction.

The Missouri Court of Appeals reviewed several decisions on this issue in *Tennis v. General Motors Corp.,* 625 S.W.2d 218 (Mo. Ct. App. 1981). Noting that *Dempsey* was an FELA case and was decided before the Missouri Approved Jury Instructions were approved by the Missouri Supreme Court, the court explained its ruling in *Senter v. Ferguson,* 486 S.W.2d 644 (Mo. Ct. App. 1972), in which the court held that it was error to give the same instruction given in *Dempsey.* In *Tennis,* the court explained that *Senter* was a post-MAI case, and that MAI 4.01, not *Dempsey,* controlled the instruction issue in a non-FELA case. MAI 4.01, the only permissible and authorized damage instruction in a non-FELA case, explicitly did not incorporate the

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[9] *In re Air Crash Disaster,* 701 F.2d 1189 (7th Cir.), *cert. denied,* 464 U.S. 866 (1983).

Dempsey FELA instruction. Thus, to give the instruction would be error, since the instruction is "clearly an addition to or 'modification' of MAI 4.01." *Tennis,* 625 S.W.2d at 226. Moreover, the second edition of MAI did not include the *Dempsey* instruction even in its damage instructions for FELA cases, MAI 8.01 and 8.02. Following the Supreme Court decision in *Liepelt,* however, both FELA instructions were modified in the third edition to contain the charge that " 'any award you may make is not subject to income tax.' " *Id.* at 227. "It seems worthy of note that although FELA instructions MAI 8.01 and 8.02 were changed in the 3rd Edition of MAI in compliance with *Norfolk,* MAI [4.01] has not been altered nor amended to include a direction that any awarded damages are 'not subject to income tax.' " *Id.* Thus, in *Tennis,* the Missouri Court of Appeals found no error in the lower court's refusal to give the instruction in a non-FELA case.

Again, in *Kenton v. Hyatt Hotels Corp.,* 693 S.W.2d 83 (Mo. 1985), appellant argued error in the court's refusal to give a similar instruction. *Id.* at 96. The Missouri Supreme Court reviewed the law, and affirmed the lower court. "The trial court here cannot be convicted of error, requiring a new trial, in following the established law of this state." *Id.* at 96.

Thus, to the extent that FMC presented the court with an instruction that the judgment would not be subject to income taxation, we find no error in the district court's refusal to give such an instruction.

Missouri law is somewhat less clear, however, regarding the admissibility of evidence relating to the effects of income tax on a lost-income stream. The controlling case appears to be *Dempsey.* In Dempsey, defendant argued on appeal that the trial court had erred in refusing to permit defendant to cross-examine plaintiff's witness about the effects of income tax on a personal injury award. *Dempsey,* 251 S.W.2d at 43. The Missouri Supreme Court held that:

> The trial court did not err either in refusing to permit defendant to cross-examine plaintiff's actuarial witness relative to income tax liability or in refusing to permit defendant to argue to the jury that in arriving at the amount of its award it should consider only the amount of future earnings lost to plaintiff after deduction of income taxes for which he would have been liable had he continued his employment without injury.

Id. at 45. While it is unclear as to whether FMC's attempted cross-examination concerned Gander's tax liability on the award or the effects of income taxes on lost income, the Missouri court's reference to defendant's proposed argument is exactly on point. This is precisely what FMC attempted to do in this case, and it is this point of law about which FMC admitted to the district court that it was uncertain. To the extent that *Dempsey* is the controlling law, the district court did not err in refusing FMC's proposed cross-examination.

The issue is somewhat clouded, however, by *Nesselrode,* 707 S.W.2d 371. FMC argues that in *Nesselrode* the Missouri Supreme Court explicitly found the sort of cross-examination that FMC attempted to be permissible. By implication, FMC argues that *Nesselrode* silently overrules the precise holding of *Dempsey* which found no error in refusing exactly the sort of cross-examination FMC attempted. We do not agree that *Nesselrode* controls this case.

Indeed, whether a defendant can cross-examine about the effects of income taxes on plaintiff's lost income stream was not even at issue in *Nesselrode.* Rather, the context in which the court makes the reference to cross-examination on which FMC relies concerns a dispute about the reduction of lost income to present value. Both parties in *Nesselrode* argued error in failing to establish the present value of plaintiff's lost income. Specifically, defendant argued that the court should not have allowed the jury to consider a table indicating plaintiff's lost income,

since the table contained no reductions to present value. *Id.* at 385-86. The Missouri Supreme Court characterized the issue even more narrowly. It found the issue to be whether defendant could object to the trial court's ruling on plaintiff's presentation of lost income when defendant itself failed to present any evidence of present value. *Id.* at 387.

In this context, the court mentioned in passing that while defendant did not challenge plaintiff's presentation of present value, defendant did challenge plaintiff's claim for damages. "This was done by presenting evidence in connection with decedent's history of health problems, questioning the three daughters' monetary reliance on decedent, and by *pointing out through cross-examination that decedent's projected stream of lost-income does not take into consideration his income tax obligations.*" *Id.* at 388 (emphasis added). We do not believe that this passing reference to cross-examination can be interpreted in such a way as to overrule *Dempsey*. The propriety of the cross-examination was not at issue in *Nesselrode* and was not addressed by the court. Nor, apparently, was the cross-examination in *Nesselrode* the subject of an objection by plaintiff's counsel at trial. This language in *Nesselrode,* then, is just a mere, isolated reference in passing to the sort of cross-examination attempted by FMC. This same sort of cross-examination, by contrast, was specifically addressed in *Dempsey*. FMC presented no persuasive law to the district court in support of such cross-examination, and it likewise presents none here. Thus, we find no error in the district court's ruling.

III. CONCLUSION

We have considered FMC's other arguments on appeal and find them to be without merit. For the reasons stated, we affirm the judgment of the district court.

HENLEY, Senior Circuit Judge, dissenting.

I respectfully dissent.

The majority acknowledges that the note at the end of the verdict form was confusing; so confusing, in fact, that the district judge read it one way at trial, only to reach a radically different interpretation a few months later. The majority even goes so far as to recommend that the form as it is now written not be used in future cases. Nevertheless, the court is unable to conclude that use of the form was improper here.

If the district court had given an appropriate instruction that the plaintiff's fault would not reduce his recovery under the strict liability claim, I might be less concerned about the verdict form. The majority points out that the trial judge instructed the jury to find the total amount of damages "disregarding any fault on the part of the plaintiff" and that the jury was told the plaintiff's recovery for negligence would be reduced by the percentage of his fault. These directives, however, provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instructions and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault. In these circumstances, I do not believe that the "charge as a whole . . . state[d] the governing law fairly." *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1215 (8th Cir. 1986).

There is another troublesome aspect to this case. The majority summarily dismisses without discussing the defendant's argument that the district court should have defined the term "defective condition" in instructing the jury regarding the strict liability theory. The trial judge described in explicit detail what would constitute negligence on the part of the defendant and the plaintiff. *See, e.g.*, Instruction No. 14 (instructing jury to assess a percentage of fault to the defendant if at the time the coal conveyor was sold, the conveyor "had an in-running nip point and shear edge at the transfer chute and was therefore dangerous when put to a use reasonably anticipated"); Instruction No. 16

("The term 'negligent' or 'negligence' as used in these instructions with respect to Todd Gander means the failure to use that degree of care that an ordinarily careful and prudent coal conveyor operator would use under the same or similar circumstances."). In contrast, the district court gave no description of what facts would warrant a finding that the conveyor was sold in a "defective condition," as required by the strict liability theory. Given that the district court's ultimate decision regarding the plaintiff's recovery was based on the outcome of the strict liability claim without any regard to jury's findings on the negligence cause of action, it is ironic that the jury had such explicit instructions regarding what particular facts would constitute negligence while being left with no guidance at all regarding the definition of a "defective condition."[1]

Concededly it might be permissible for a trial judge not to give an instruction regarding the definition of a "defective condition" in a single issue products liability action involving a simple consumer good. Yet I cannot agree that a jury may be left with no guidance at all on the definition in a case involving factory equipment with which few typical jurors can be expected to be familiar, and in a case where negligence is defined and the jury can infer from the verdict form that recovery on either negligence, strict liability, or both will be reduced by the percentage of plaintiff's fault.

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[1] The Missouri Supreme Court has indicated in dicta that the Missouri approved jury instructions (MAI) require that the jury not be given a definition of "defective condition." *See Nesselrode v. Executive Beachcraft, Inc.*, 707 S.W.2d 371, 378 & n.11 (Mo. 1986) (en banc); *see also Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 837 (Mo. Ct. App. 1984). We have held, however, the MAI provide only guidance, not binding authority, for the giving of instructions in a federal diversity case. *See, e.g., Bersett v. K-Mart Corp.*, 869 F.2d 1131, 1134-35 (8th Cir. 1989); *cf. Cowens v. Siemens-Elema AB*, 837 F.2d 817, 822 (8th Cir. 1988) (rejecting argument that *Nesselrode* reasoning prohibited the district court in a diversity case from defining the term "unreasonably dangerous" as used in a strict liability instruction).

I recognize that the plaintiff suffered a grievous injury that might warrant a two-million dollar damage award. I am concerned, however, that the award be the result of a verdict which is free of the taints that affect the one here. Thus, I would reverse and remand for a new trial.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No: 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

JUDGMENT

(Filed July 13, 1988)

This action came before the Court and jury with the parties having appeared in person and by their respective attorneys. The issues were duly tried and the jury rendered its verdict on March 15, 1988.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of strict liablity/product defect against defendant FMC Corporation, the jury returned a verdict in favor of plaintiff, Todd Gander.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of negligence, the jury assessed percentages of fault as follows: to defendant FMC Corporation - 10%; to plaintiff Todd Gander - 90%.

WHEREAS, the jury further found the total damages of plaintiff, Todd Gander, to be TWO MILLION DOLLARS ($2,000,000.00).

WHEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED on plaintiff's claim for personal injury based on the theory of strict liability/product defect, that the plaintiff, Todd

Gander, have and recover from defendant, FMC Corporation, the sum of TWO MILLION DOLLARS ($2,000,000.00), together with court costs.

WHEREFORE, it is hereby further ORDERED, ADJUDGED and DECREED that plaintiff, Todd Gander, on his claim for personal injuries based on the theory of negligence, have and recover from defendant FMC Corporation, the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00), together with court costs.

It is further ORDERED that the amount of damages recoverable under that portion of this JUDGMENT based on the negligence theory shall not be in addition to the amount of damages recoverable under that portion of this JUDGMENT based on the theory of strict liability/product defect.

SO ORDERED:

/s/ George F. Gunn, Jr.
District Judge

DATE: 7/13/88